

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0665

Order filed 2/25/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DAVID GRESTA,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
MICHAEL TURCZYN,)	No. 08L3
Defendant-Appellee.)	
)	Honorable
)	Peter C. Cavanagh,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

Held: Because plaintiff failed to prove the identity of defendant as the alleged tortfeasor, the trial court properly entered a judgment in defendant's favor at the close of plaintiff's evidence during the bench trial.

I. BACKGROUND

Plaintiff, David Gresta, filed a lawsuit against defendant, Michael Turczyn, for recovery of damages for both personal injury and property damage, arising out of an automobile accident, which occurred on December 2, 2006. The cause proceeded to a bench trial on July 8, 2010. Plaintiff's evidence consisted of his testimony and the introduction of three evidence depositions, those of plaintiff's treating chiropractor, plaintiff's treating physician, and an eyewitness to the accident. At the close of plaintiff's case in chief, defendant's counsel moved for judgment in his favor, arguing plaintiff had failed to carry his burden of proof identifying defendant as the alleged tortfeasor. The trial court agreed with defendant, entering judgment in his favor. Plaintiff appeals and we

affirm.

Plaintiff also challenges certain evidentiary rulings made by the trial court relating to plaintiff's proof of damages. Because we affirm the court's ruling on the motion for judgment in defendant's favor on the issue of liability, we do not reach the issues plaintiff raises as to damages.

Plaintiff testified that on December 2, 2006, he was driving his vehicle in a westerly direction on Rochester Road, Sangamon County, Illinois, at approximately 4:55 p.m. The evidence demonstrated that while Rochester Road itself was safe, a bridge over which Rochester Road runs had become ice covered. As plaintiff proceeded in a westerly direction, another vehicle, traveling east bound, either swerved or skidded into a head-on collision with plaintiff's vehicle.

Defendant did not appear at trial. In his answer to plaintiff's complaint, defendant denied that he drove his vehicle over the centerline of Rochester Road and struck plaintiff's vehicle. Moreover, he denied each and every allegation of negligence asserted against him in plaintiff's complaint. Plaintiff failed to secure defendant's appearance at trial by issuing neither a Supreme Court Rule 237(b) (eff. July 1, 2005) notice to appear nor a subpoena.

In terms of identifying defendant as the tortfeasor, plaintiff provided only the following testimony:

"Q. All right. And what, if anything--can you tell me whether or not you had occasion to notice another vehicle as you approached and went to cross the bridge?

A. This vehicle that struck me, Mr. Turczyn's vehicle.

Q. Okay, and what, if anything, as you approached and crossed the bridge did you notice concerning that vehicle?

A. That it was entering my lane of traffic. It would appear to be at a relatively high rate of speed.

Q. All right. And what happened after that?

A. The left front corner of Mr. Turczyn's vehicle struck the left front corner of my vehicle."

No other witness, including the responding law enforcement officer, appeared to testify for plaintiff.

In his motion for a judgment in defendant's favor, defense counsel argued that plaintiff had identified defendant's vehicle without identifying the driver of that vehicle. As an inanimate object, the vehicle cannot be a tortfeasor: a tortfeasor must be a person. The trial court agreed with counsel, finding that "Plaintiff has failed to meet its burden of proof as it fails to identify Defendant in the cause as it relates to alleged negligence." The court granted defendant's motion for judgment as a matter of law. This appeal followed.

II. ANALYSIS

A. Standard of Review

Both parties cite to this court's decision of *Barnes v. Michalski*, 399 Ill. App. 3d 254 (2010) for the applicable standard of review. (We note that both parties use the official citation of 339 Ill. App. 3d 254 (2010), a citation erroneously used by Lexis.) In *Barnes*, this court distinguished between the standard to be applied when reviewing a trial court's decision on a motion at the close of plaintiff's case in a jury trial (motion for a directed verdict) and a similar motion in a bench trial (motion for a judgment in

defendant's favor). *Barnes*, 399 Ill. App. 3d at 262-65. In the former, the trial court is to determine whether the plaintiff has made out a *prima facie* case as to each element of the action. In the latter:

"the trial court must perform an analysis consisting of two phases. In the first phase, the court does not weigh the evidence as of yet but merely considers whether the plaintiff has adduced at least some evidence in support of each element of the *prima facie* case. In other words, the court determines, as a matter of law, whether the plaintiff has presented at least some evidence on every element of the cause of action. [Citations.] If the plaintiff has failed to make out a *prima facie* case, the court should grant the defendant's motion. If the plaintiff has made out a *prima facie* case (by presenting at least some evidence on each element), the court then should proceed to the second phase of the analysis, in which the court weighs all the evidence." *Barnes*, 339 Ill. App. 3d at 263-64.

If the trial court grants defendant's motion in the first phase, finding that plaintiff failed to present a *prima facie* case, like the trial court did here, our review is de novo. *Barnes*, 339 Ill. App. 3d at 264.

B. Plaintiff's Failure To Prove the Element of Breach of a Duty

Plaintiff argues the trial court erred in granting defendant's motion. In his brief, plaintiff argues that he clearly identified defendant as the driver of the vehicle that collided with his vehicle. Further, defendant admitted in his answer to plaintiff's complaint

that he was the driver. Neither of plaintiff's assertions is correct.

First, plaintiff never identified a driver. He consistently identified the vehicle that struck him as "the Turczyn vehicle" but never identified, by either name or description, the operator of that vehicle.

Second, defendant did not admit in his answer that he was the driver of the vehicle. In his complaint, plaintiff alleged in paragraph 2: "That at the same time and place, defendant was driving east bound in a 2001 Mercury Sable on Rochester Road, in Sangamon County, Illinois." Defendant admitted this allegation to be true in his answer. Plaintiff further alleged in paragraph 3 of the complaint: "That at the time and place above mentioned, at a location on Rochester Road approximately a quarter of a mile east of the intersection of Rochester Road and Woodhaven Road, the defendant drove his vehicle over the center line of Rochester Road and struck plaintiff's approaching vehicle." This allegation was denied by defendant in his answer. Therefore, at trial, it was incumbent on plaintiff to prove that the named defendant was the driver of the vehicle that struck plaintiff's car.

Plaintiff could have sustained his burden of proof in a number of fashions. He could have commanded the appearance of defendant at trial by serving upon him a Rule 237(b) notice to appear or a subpoena, and then identified defendant in person as the tortfeasor. Absent defendant's appearance, plaintiff could have secured the appearance of the responding police officer to testify regarding his investigation of the accident. Neither attempt to secure proof of the identity of the named defendant was undertaken. To recover for personal injury or property damage, the law requires that a plaintiff must prove that the defendant has breached a duty owed to a plaintiff. *Barnett v. Zion Park District*, 171 Ill. 2d

378, 386 (1996).

In this case, plaintiff failed to prove in his case in chief that defendant was the tortfeasor. He presented no evidence that defendant was operating the vehicle that struck plaintiff's vehicle. Therefore, plaintiff presented no evidence that defendant breached any duty owed to plaintiff. Unable to prove breach of a duty, plaintiff is unable to recover damages.

Plaintiff also raises issues on appeal concerning the trial court's evidentiary rulings regarding the admissibility of damages evidence. Because we affirm the court's judgment finding no liability on the part of defendant, we have no reason to address those issues.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment.

Affirmed.